Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

Keller Communications, Inc.,

Petitioner,

vs.

Federal Communications Commission,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER D. IMLAY
BOOTH, FRERET, IMLAY & TEPPER, P.C.
5101 Wisconsin Avenue, NW
Suite 307
Washington, DC 20016-4120
(202) 686-9600

Attorney for Petitioner

25 pp

QUESTIONS PRESENTED

1. Is the Federal Communications Commission entitled to selectively waive its application, coordination, and licensing rules based solely on unsupported and factually inaccurate allegations of an impending public safety crisis?

2. Did the Federal Communications Commission act arbitrarily and capriciously, and otherwise abuse its administrative discretion, by instituting a *de facto* irrebuttable preference for public safety entities over commercial applicants?

3. Did the Court of Appeals err in upholding a ruling of the Federal Communications Commission for which there was no evidentiary support in the record?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the City of Lewisville, Texas, appeared as Intervenor in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Keller Communications, Inc., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reprinted in Appendix B hereto. The opinion of the Federal Communications Commission is reported at 11 FCC Rcd 19638 (1996) and reprinted in Appendix C hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 12, 1997. The Court of Appeals denied a timely petition for rehearing and/or rehearing *en banc* on February 6, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706, provides as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

Pursuant to the provisions of the Communications Act of 1934, as amended, the Federal Communications Commission rules provide for and regulate various private land mobile radio services. Officials of the City of Lewisville, Texas, executed an agreement with the neighboring Town of Flower Mound whereby certain land mobile frequency channels previously licensed to Flower Mound would be added to Lewisville's existing radio system. Lewisville would then provide dispatch services to Flower Mound at commercial rates (*i.e.*, in direct commercial competition with private providers in the area).

Lewisville submitted an application purporting to assign the Flower Mound license to the Commission's designated frequency coordinator for processing and filing with the Commission. The Lewisville application contained both substantive and procedural defects which the coordinator failed to detect before it forwarded the application to the Commission. Furthermore, the Flower Mound license expired shortly after the Lewisville application was submitted, yet neither Flower Mound nor Lewisville attempted to file for renewal or reinstatement of that license. The Commission staff also neglected to notice the errors and granted the application. Although that grant was withdrawn once the Commission realized its error, the application was placed on "pending" status, rather than being returned as defective, as required by the Commission's rules.

During those proceedings, Petitioner Keller Communications, Inc., (Keller) filed a mutually-exclusive finder's preference request which would allow Keller exclusive use of one frequency pair designated in the Lewisville application. When that request was ultimately dismissed as premature by the Commission staff, Lewisville was immediately informed by telephone and prompted to refile its application. When Keller received notice of the dismissal by mail, it filed a second finder's preference request, as well as a regular application for use of the frequency pair.

Although Lewisville submitted the same defective application, and neglected to file through the frequency coordinator as required, its application was again granted by the Commission staff, which issued, on the staff's own motion, a blanket waiver of "all defects" in the Lewisville application. The staff justified the waiver on public safety grounds because correspondence sent by Lewisville officials to the Commission threatened that public safety services would be "adversely affected" without this additional channel pair. Although no objective evidence exists in the record to justify such a finding, and although the Commission's database indicated that both Flower Mound and Lewisville already held a variety of licenses for multiple channels (indeed, they have both received additional licenses since the commencement of this litigation), the Commission denied Keller's application for review of the rule waiver and concomitant license grant.

On appeal, the Court of Appeals for the District of Columbia Circuit ruled that the Commission had adequate discretion to waive its rules in the interest of public safety.

Keller's suggestion for rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

The Court of Appeals clearly abandoned its statutory duty, under section 706 of the Administrative Procedure Act, 5 U.S.C. §706, to ensure that administrative decisions of federal agencies are reasonable based on the record evidence. Although Keller conceded at oral argument below, as it must, that an effective waiver "for good cause shown" would certainly be valid grounds for grant of the defective Lewisville application, the undisputed, substantiated facts in the case indicate absolutely no impending communications crisis. In fact, the Federal Communications Commission, without warning or opportunity for comment, declared a *de facto*, irrebuttable preference for a public sector applicant, despite all

equities weighing in favor of a competing private sector applicant (Keller), and despite the fact that the Commission's own database indicated that Lewisville already held more than sufficient licensed channels for its needs.

The Court of Appeals panel correctly observed that waiver procedures are a necessary part of any regulatory system. It also noted the long line of precedents requiring that an agency clearly state its reasons, with citations to supportive record evidence, for granting a waiver. Nevertheless, although there is absolutely no evidence to justify the expansive waiver involved in this case, and certainly none cited by the Commission at any stage of the proceedings, the panel concluded that the Commission was justified in granting the waiver based on nothing more than Lewisville's unsubstantiated, gratuitous, and factually inaccurate statement that its public safety functions would be "adversely affected" without exclusive use of this single additional channel pair, and that the neighboring Town of Flower Mound, with which Lewisville (a public entity) had an agreement to provide commercial dispatch services, would be left without any emergency communications at all. Such a self-serving and emotion-charged allegation, completely at odds with the facts, was unfair and obviously prejudicial to Keller's relative position before the agency. By ruling that the Commission did not err in exercising its discretion without first investigating the veracity *vel non* of Lewisville's claims, and without citing any objective facts which lead to the conclusion that a communications crisis would even be possible in this case, the panel set a dangerous precedent which, as a practical matter, means that any governmental entity will have an automatic, irrebuttable preference over any opposing private party – regardless of the actual equities involved.

Keller does not ask that the courts second-guess the Commission. It is hornbook administrative law that a "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. 402, 416 (1971). In fact, this Court has repeatedly stressed:

> While we may not supply a reasoned basis for the agency's action that the agency itself has not given, SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (1945).

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974). Nevertheless,

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Id., 419 U.S. at 288 n.4. Because the Commission staff did not apprise the parties of its intent to grant a waiver, thus allowing Keller to rebut the factual inaccuracies in the staff's conclusions regarding the alleged communications crisis, the Commission denied Keller of its right to due process of law. This is a perfect example of a case where the Commission has "indicate[d] a predilection to grant th[is] particular application[], followed by a strained attempt to marshal findings to support such conclusion." *Id.* at 297 (quoting opinion below). Such behavior is surely arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

This Court has repeatedly ruled that agencies "must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made." *Motor Vehicle M'fers Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52 (1983), *citing Burlington Truck Lines, Inc. v. United States, supra*, 371 U.S. 156, 168 (1962). Yet the Commission's ruling cited no evidence (other than Lewisville's

unsubstantiated, gratuitous, and inaccurate threat) and made no rational connection to the objective realities (*i.e.*, that Lewisville and Flower Mound had existing licenses with more-than-sufficient channel capacity) and the choice made (*i.e.*, to uphold unnecessary waivers which would allow Lewisville to have even more channels).[1] The circumstances involved here are thus not unlike previous cases in which this Court has found agency action invalid:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such practice. Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.

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[1] As noted in the ruling of the Court of Appeals, the channels at issue in this case were designated as "General Category" channels for which all Part 90, Subpart S, eligibles (including both Keller and Lewisville) could apply. Those channels are currently saturated in the Dallas/Ft. Worth metropolitan area. Yet channels are still available in the exclusive Public Safety Pool as evidenced by the fact that both Lewisville and Flower Mound have received additional licenses during the course of this litigation, while Keller has been unable to expand its own system. The public safety preference involved here is doubly prejudicial to private parties because Lewisville has access to more frequencies while providing commercial services on its system in direct competition with private parties such as Keller.

Motor Vehicle M'fers Ass'n, 463 U.S. at 48, quoting *Burlington Truck Lines, Inc.*, 371 U.S. at 167 (internal punctuation and citations omitted).

Because the Federal Communications Commission did not "cogently explain why it has exercised its discretion in a given manner," *Motor Vehicle M'fers Ass'n* at 48-49 (citing cases), and the Court of Appeals failed to correct that error, the decision below must be reversed. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

KELLER COMMUNICATIONS, INC.

By: *Christopher D. Imlay*
Its Attorney

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1001 **September Term, 1997**

Keller Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

City of Lewisville, Texas,
Intervenor

BEFORE: Ginsburg, Sentelle and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed January 15, 1998, it is

ORDERED that the petition be denied.

Per Curiam

[FILED Feb. 6, 1998]

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1001 **September Term, 1997**

Keller Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

City of Lewisville, Texas,
Intervenor

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

[FILED Feb. 6, 1998]

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 27, 1997 Decided December 12, 1997

No. 97-1001

KELLER COMMUNICATIONS, INC.,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

CITY OF LEWISVILLE, TEXAS,
INTERVENOR

Appeal of Orders of the
Federal Communications Commission

Dan Warnock argued the cause for appellant. With him on the briefs was *Christopher D. Imlay*.

K. Michele Walters, Counsel, Federal Communications Commission, argued the cause for appellee. With her on the briefs were *William E. Kennard*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Roberta L. Cook*, Counsel.

L. Andrew Tollin and *Jeffrey S. Cohen* were on the brief for intervenor City of Lewisville, Texas. *Lawrence J. Movshin* entered an appearance.

Before: GINSBURG, SENTELLE and TATEL, *Circuit Judges*.

TATEL, *Circuit Judge*: The Federal Communications Commission waived several regulatory requirements to permit a Texas city to add a nearby town's frequency to its own public safety radio system. Because the Commission's determination that the waiver was necessary to protect public safety finds support in the record and is neither arbitrary nor capricious, we affirm the Commission.

I

Like many municipalities, Lewisville, Texas, uses a "trunked radio system" for fire, police, and emergency medical communications. Unlike conventional radio systems, which have a specific frequency channel assigned to mobile and base stations, trunked systems have multiple channels for use as a "trunk group." *See* 47 C.F.R. § 90.7 (1996). Because computers assign calls to the next available channel on trunked systems, more than one party can communicate at a time. Under Commission rules, conventional channel licensees must share their channels, but trunked system licensees enjoy exclusive use of their channels. *See id.* §§ 90.631(b), 90.633(b).

By late 1992, Lewisville had grown concerned that its public safety radio system was overloaded. At the same time, its neighboring town, Flower Mound, worried that its conventional safety communications system had become inadequate. To solve both their problems, the two towns agreed that Lewisville would add Flower Mound's conventional channel to its trunked system and then, with its newly expanded capacity, take over communications services for Flower Mound. Because trunked systems have exclusive use of added channels, Commission rules in effect at the time required Lewisville to get consent from anyone who might be sharing Flower Mound's conventional channel. 47 C.F.R. § 90.615(b)(2)(ii) (1992). To accomplish this, the rules required Lewisville to submit its application to a "frequency coordinator" who, after checking the Commission's database, would either certify that no one else had a license to use Flower Mound's channel or would inform Lewisville that someone did. *See id.* § 90.615(b)(2)(iv). If another license is discovered, even a canceled or expired one, the Commission's "database deletion policy" prohibits the coordinator from forwarding the

application to the Commission. *See Amendments of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, Report and Order*, 6 F.C.C.R. 7297, 7301-02 (1991).

In accordance with these requirements, Lewisville sent its application to the public safety frequency coordinator. On February 2, 1993, the day Flower Mound's license expired, the coordinator certified that no co-licensee shared the Flower Mound's frequency and sent the application to the Commission. The coordinator, however, failed to detect that one Robert Greene also owned a license for Flower Mound's conventional frequency. Although Greene's license had expired some three months earlier because he had failed to construct a station within the eight months required by Commission regulations 47 C.F.R. § 90.633(d) (1996), the license remained in the Commission's database.

Discovering what the frequency coordinator missed, appellant Keller Communications, Inc., an operator of several frequencies in the area, filed a "finder's preference request" for Greene's license. One who alerts the Commission to the existence of a license that has expired due to the license holder's failure to construct a station in time may receive an exclusive license for the discovered channel. *See id.* § 90.173(k). But because finder's preference requests could not be filed until 180 days after the construction deadline, Keller's filing was fatally premature. *See* 47 C.F.R. § 90.173(k)(2) (1992); *Amendments of Part 1 and 90*, 6 F.C.C.R. at 7307 ("[W]e establish a 180-day window ... during which we will not accept any finder's requests filed against [the target] licensee."). Although Greene later submitted a petition to cancel his license, the Commission took no action; according to the agency, it does delete canceled licenses while finder's preference requests are pending.

By now then, the Commission faced a bit of a mess–a defective application (Lewisville's); a defective finder's preference request (Keller's); and an expired license in its database (Greene's). Confusing matters further, the Commission mistakenly granted Lewisville the license. Later discovering its error, the Commission revoked the license, explaining in a June 8 letter to Lewisville that its application had been returned to "pending" status and that Flower Mound's license had been reinstated. The letter also informed Lewisville that it could resubmit its

application either if it obtained Keller's consent or if the Commission denied Keller's finder's preference request.

Apparently having had enough of the Commission's formal procedures, Lewisville sent a letter to U.S. Senator Phil Gramm, warning that if the Commission failed to grant its application, "[t]he operation of the police and fire departments serving the population of these communities will be adversely affected." Lewisville sent a copy of the letter to the Commission but not to Keller. One month later, the Commission dismissed Keller's premature finder's preference request, informing Lewisville by phone on the same day that it could resubmit its application. Bypassing the frequency coordinator, Lewisville promptly resubmitted its application.

Now it was Keller's turn to act. It filed another finder's preference request as well as a conventional application for Flower Mound's channel, but to no avail. The Commission denied both, rejecting the conventional application because Lewisville had already applied for the frequency and the finder's request because Greene had canceled his license.

On September 3, in an action central to this case, the Commission granted Lewisville's license even though Greene's canceled license remained in the database. Relying on its waiver regulations, which provide that agency rules "may be ... waived for good cause shown, in whole or in part, at any time by the Commission," 47 C.F.R. § 1.3 (1996), the Commission explicitly waived the database deletion requirement as well as all other defects in Lewisville's application:

> Because Greene's station is no longer operating, we are waiving the requirement that the City of Lewisville obtain Greene's consent to convert this channel to trunked use and, alternatively, we are waiving the requirement that Greene's license be deleted from the database prior to coordination of the City of Lewisville for use of this frequency at their location.... We find good cause to be present warranting this action. Absent this waiver, the City of Lewisville will be unable to accomodate [sic] the Town of Flowermound [sic] and Flowermound [sic] public safety entities (including police, fire, and ambulance services) will be left without critical radio communications. Further, the City of

> Lewisville's police, fire, ambulance and public service departments will be hampered by an overloaded public safety communication system. In light of these factors which weigh heavily in favor of granting the above referenced application and given our statutory mandate to consider the public interest, we are waiving any defects in Lewisville's application.

In a Petition for Reconsideration to the Private Radio Bureau, Keller argued that the Commission improperly exercised its waiver authority and committed a variety of other procedural errors. After the Bureau denied the petition, Keller appealed to the full Commission, reiterating its arguments and adding that Lewisville had violated the agency's *ex parte* rules by sending the Gramm letter to the Commission but not to Keller. Finding no *ex parte* violation and concluding that "the waiver was necessary to protect the public safety and security of two populous communities in the Dallas/Fort Worth area," the Commission denied Keller's application for review. *City of Lewisville, Texas Application for Modification of Trunked Public Safety/Special Emergency Radio Station License Station KNGK 472, Memorandum Opinion and Order*, 11 F.C.C.R. 19638, 19642 (1996). Keller now appeals, arguing that the Commission's actions were arbitrary, capricious, and an abuse of discretion. *See* 5 U.S.C. § 706(2)(A) (1994).

II

In addition to its complaint about the waiver, Keller challenges virtually every other Commission action in this case. Granting Lewisville's application, it argues, was improper not just because Greene's license remained in the database, but also because the application–whether labeled as an application for assignment, modification, or new station–was technically defective under Commission rules. Keller also argues that the Commission erred by placing Lewisville's application in pending status rather than dismissing it, by reinstating Flower Mound's license on its own motion, and by allowing Lewisville to resubmit its application directly to the Commission rather than to the frequency coordinator. As Keller conceded at oral argument, however, we need not consider any of these issues if the Commission acted within its authority by waiving the defects in Lewisville's application, including the database deletion requirement.

If proper, the waiver eliminated Greene's license as a bar to Lewisville's application, removed any technical defects in the application, and made irrelevant all errors Keller alleges the Commission committed after February 2, the date the frequency coordinator sent Lewisville's flawed application to the Commission. *See* Letter from W. Riley Hollingsworth, Federal Communications Commission, to Raymond A. Kowalski, Counsel for Appellants (Aug. 9, 1994) (explaining that the result of the waiver was "to place the parties in the position they would have been in had the coordinator not erred").

The Commission's rules allow it "at any time" to waive requirements for good cause. *See* 47 C.F.R. § 1.3 (1996). As we have held, "an agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The Commission may waive its rules if "particular facts would make strict compliance inconsistent with the public interest." *Northeast Cellular Tel. Co v. FCC*, 897 F.2 1164, 1166 (D.C. Cir. 1990); *see also Omnipoint Corp. v, FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (Commission properly waived comment requirement because the waiver was "necessary in order to reduce the harm resulting from delay"). In exercising its waiver authority, however, the Commission may not "act out of unbridled discretion or whim ... any more than in any other aspect of its regulatory function," *WAIT Radio*, 418 F.2d at 1159, and it must clearly state in the record its reasons for granting the waiver. *See Basic Media Ltd. v. FCC*, 559 F.2d 830, 833 (D.C. Cir. 1977); *see also Northeast Cellular*, 897 F.2d at 1166 ("The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.").

Particularly important to this case, Congress directed the Commission to consider public safety needs when exercising its discretion, encouraging it to "make available ... radio communication service[s] ... for the purpose of promoting safety of life and property," 47 U.S.C. § 151 (1994), and requiring it to "promote the safety of life and property" when managing the private land mobile services spectrum, *id.* § 332(a)(1). The Conference Report accompanying this latter provision urged the Commission "to be ever vigilant to promote the

private land mobile spectrum needs of police departments and other public agencies which need to use such radio services to fulfill adequately their obligations to protect the American public." H.R. CONF. REP. No. 97-765, at 52-53 (1982), *reprinted in* 1982 U.S.C.A.A.N. 2261, 2296. The Commission often exercises its waiver authority to fulfill this mandate. *See, e.g., Waiver of Parts 2 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482-488 MHZ on a Conditional Basis, Order*, 10 F.C.C.R. 4466, 4468 (1995) (waving requirements because "public safety agencies in the New York City metropolitan area have an urgent and immediate need for additional spectrum capacity for public safety communications"); *Waiver of Sections 90.621(d), 90.623(a), 90.629, 90.633, and 90.651(c) of the Commission's Rules to License Use of Six Conventional 900 MHZ Frequency Pairs for an Advanced Train Control System, Order*, 3 F.C.C.R. 427, 428 (1988) (citing 47 U.S.C. §§ 151, 332(a)(1) in support of waiver granted to facilitate development of an Advanced Train Control System which would "improve railroad safety ... dramatically").

Applying these principles, we think the waiver here was well within the Commission's authority. The Commission had ample reason to believe that the waiver was necessary to protect public safety in both Lewisville and Flower Mound. Lewisville told the Commission that without the license, it would "have no option but to terminate its agreement with the Town of Flower Mound," leaving the growing town "without emergency communications for [its] police and fire protection and emergency medical services," burdening Lewisville "with an overloaded public safety communications system," and creating "emergency situations in which police, fire and medical units would receive busy signals when they attempt to transmit critical information." In addition to relying on these public safety concerns, the Commission found, reasonably we believe, that the waiver was justified by the coordinator's failure to discover Greene's license and by Lewisville's expenditure of thousands of dollars of public funds in reliance on the agency's mistaken grant of its license. *Memorandum Opinion and Order*, 11 F.C.C.R. at 19641.

Challenging Lewisville's public safety claims, Keller points out that Flower Mound possessed other licenses. According to Lewisville, those other channels, part of an old system with limited geographical

coverage, were inadequate for primary emergency use. Apparently agreeing with Lewisville, the Commission concluded that the two towns needed to use Flower Mound's conventional channel in conjunction with Lewisville's trunked system to protect public safety in the region. Whether particular channels provide adequate public safety communications is precisely the type of technical issue on which we defer to the Commission's expertise. *See MCI Cellular Tel. Co. v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984) (when the Commission addresses a "highly technical question," the court "must show considerable deference to [its] expertise"). Apart from offering to provide the necessary communication services itself, presumably at an appropriate price, Keller introduced no evidence to counter Lewisville's claim that it needed Flower Mound's license to protect public safety. Keller argues that in denying the Petition for Rehearing, the Commission relied on evidence not submitted until after it granted the original waiver, but the case on which it relies–*National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1204 (D.C. Cir. 1984)–holds only that agencies cannot present arguments in court not relied upon during the administrative process; nothing in that decision bars agencies from relying on evidence submitted at different stages of the administrative process.

Keller's only remaining claim is that Lewisville violated the Commission's *ex parte* rules by forwarding a copy of the Gramm letter to the Commission but not to Keller. Those rules prohibit *ex parte* communications between parties and the Commission in "restricted proceedings." 47 C.F.R. § 1.1208 (1996). The parties disagree about whether the coexistence of the Keller and Lewisville applications created a "restricted proceeding." We need not resolve that issue, however, because although Lewisville's letter may have inspired the Commission to dismiss Keller's finder's preference request, the Commission could not possibly have awarded Keller the license–Keller's preference request was fatally premature. Whether the proceeding were restricted or unrestricted, Lewisville's *ex parte* communication with the Commission was therefore harmless. *See Freeman Engineering Assocs., Inc. v.FCC*, 103 F.3d 169, 184 (D.C. Cir. 1997).

Under all of these circumstances, we find no basis for questioning the Commission's waiver. Because the waiver returned the parties to the position they occupied on February 2, except that Greene's license in the database no longer barred awarding Lewisville the license, we need not

address Keller's challenges to the Commission's other post-February 2 actions. Because the waiver also removed any technical defects that might have existed in Lewisville's application, the Commission's order is affirmed.

So ordered.

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
The City of Lewisville, Texas	)	File No. 9302618725
Application for Modification of	)	
Trunked Public Safety/Special	)	
Emergency Radio Station License	)	
Station KNGK 472	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1996 **Released: December 23, 1996**

By the Commission:

INTRODUCTION

1. Keller Communications, Inc. (KCI) filed an Application for Review on September 8, 1994 challenging the grant of the application of the City of Lewisville (Lewisville) to modify the facilities for Station KNGK 472[1] to add a frequency to its trunked Public Safety/Special Emergency Radio system. The former Private Radio Bureau (Bureau) had waived the database deletion requirement in granting Lewisville's modification application, due to the public safety interests involved.[2] For the reasons which follow, the Application for Review is denied.

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[1] We note that KCI apparently filed its challenge against the wrong call sign, WNGK 472.

[2] Letter from W. Riley Hollingsworth, Deputy Chief, Licensing Division, to Greg Ballentine, Communications Manager, City of Lewisville, dated Spetember [sic] 3, 1993.

BACKGROUND

2. In January, 1993, the Town of Flowermound [sic] (Flowermound), a public safety entity, was licensed and operating a conventional station serving the community's public safety needs with twelve mobiles on 854.4375 MHz, a General Category frequency.[3] Robert Greene (Greene), a commercial communications provider, was licensed to operate additional mobiles on the same channel approximately twenty miles away. However, Greene did not construct his station by the construction deadline of November 4, 1992.[4] In the same area, Lewisville operated a trunked 800 MHz public safety system on other channels.[5]

3. On February 2, 1993, the Association Public Safety Communications Officers, Inc. (APCO), the frequency coordinator for public safety frequencies, coordinated an application submitted by Lewisville seeking to add Flowermound's channel, 854.4375 MHz, to its police, fire and emergency medical communications system. Under our rules, before a conventional channel can be added to a trunked system, applicants are required to obtain the consent of co-channel licensees.[6] In this connection, Lewisville's application included an agreement with Flowermound acknowledging its consent to Lewisville's proposal. Under this agreement, Lewisville would utilize the frequency in return for providing communication services to Flowermound's fire, police and emergency medical services. Although Greene had not timely

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[3] In the 800 MHz band, certain frequencies are reserved for particular groups of users, *e.g.*, public safety users, industrial land transportation users, or business users. 47 C.F.R. § 90.621(a). General Category frequencies, however, are available to any Part 90, Subpart S eligible. 47 C.F.R. § 90.615.

[4] See 47 C.F.R. § 90.633.

[5] The specific channels included in Lewisville's system are 815.2125, 814.2125, 813.2125, 811.2125, 810.2125, 809.4375, 860.2125, 859.2125, 858.2125, 856.2125, 855.2125 MHz.

[6] See 47 C.F.R. § 90.615.

constructed his facilities, his authorization still appeared on the Commission's database as of February 2, 1993. The Lewisville application, however, did not address Greene's consent to the proposal or the status of his authorization. APCO, when it certified that the frequency was available in the area and could be added to Lewisville's trunked system, also failed to account for Robert Greene. Also on February 2, 1993, Flowermound's license expired.

4. On March 22, 1993, KCI filed a request for a finder's preference seeking a preference for Greene's station.[7] On May 1, 1993, Robert Greene requested that his license be cancelled. On May 10, 1993, Lewisville's application was granted.

5. When the coordinator error was discovered by KCI and brought to the Commission's attention, the Bureau set aside the grant of Lewisville's application and returned the application to pending status, stating that it would resolve KCI's preference request prior to acting on Lewisville's application. On July 22, 1993, the KCI preference grant was dismissed as defective in accordance with Section 90.173(k)(2) of our rules.[8] Its request was premature because the Commission's rules require that finders wait 180 days after a construction deadline before filing a finder's preference request.[9] This period allows the Commission to conduct its routine review of whether a licensee constructed in accordance with the rules and to cancel licenses for stations that were not constructed. On July 26, 1993, Lewisville resubmitted its application. On August 2, 1993, KCI applied for a license to use the frequency, seeking to claim the position vacated by Flowermound's recently expired

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[7] The finder's preference program aids in the rapid reassignment of unused and underutilized frequencies. Pursuant to this program, a party may obtain a preference for certain land mobile channels by conclusively demonstrating that a current license cancelled automatically due to a failure to construct in a timely fashion, or a permanent discontinuance of operation. 47 C.F.R. § 90.173(k).

[8] *See* 47 C.F.R. § 90.173(k)(2) (former).

[9] 47 C.F.R. § 90.173(k).

license.[10] KCI also filed another finder's preference request after Greene had requested cancellation of his license. This finder's preference request was denied on August 16, 1993, because the target license had already been cancelled at the licensee's request.

6. On September 3, 1993, Lewisville's modification application was granted after the Bureau, on its own motion, waived the requirement that a licensee obtain co-channel concurrence from other licensees and the database deletion requirement.[11] Absent this waiver, Lewisville would have needed to wait until Greene's license was removed from the Commission database before applying to add the channel to its trunked system. The Bureau recognized that without the waiver, the town of Flowermound would have been left without necessary public safety communications capability. At this time Greene's license remained on the Commission database because of the pendency of KCI's defective finder's preference requests.

7. On October 4, 1993, KCI filed a petition for reconsideration which was denied on August 9, 1994.[12] On September 8, 1994, KCI filed its Application for Review. Lewisville filed a pro se opposition on October 6, 1994. The opposition was filed in the form of a letter to the Office of Operations (Gettysburg) with copies to the Office of General Counsel, the Bureau Chief, and KCI's former counsel. On October 2, 1994, KCI moved to strike the opposition because it failed to comply

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[10] KCI's application also had a defective coordination. Because Lewisville's application was in pending status, the channel could not be coordinated as available until Lewisville's application was resolved. KCI's coordinator, Industrial Telecommunications Association, Inc., requested and was denied APCO's concurrence due to the pendency of Lewisville's application.

[11] Letter from W. Riley Hollingsworth, Deputy Chief, Licensing Division, to Greg Ballentine, Communications Manager, City of Lewisville dated September 3, 1993. *See* 47 C.F.R. § 1.3 (concerning Commission's general waiver authority).

[12] Letter from W. Riley Hollingsworth, Deputy Chief, Licensing Division, to Raymond A. Kowalski, Esquire, dated August 9, 1994.

with the procedural requirements in 47 C.F.R. § 1.115(f). On October 20, 1994, Lewisville filed an Opposition to Motion to Strike and Motion to Accept Supplemental Opposition to Application for Review. Finally, on November 4, 1994, KCI filed an opposition to Motion to Accept Late-filed Supplemental Opposition to Application for Review.

DISCUSSION

8. As an initial matter, we address KCI's procedural challenges to Lewisville's Opposition to KCI's Application for Review. We believe that it would be in the public interest to consider all of the information provided by the interested parties. Accordingly, we will consider all of the pleadings filed in this proceeding.

9. In its Application for Review, KCI asserts that the Bureau's waiver was arbitrary and capricious, and represents a change in policy creating a preference for public safety entities in the assignment of General Category frequencies.[13] By contrast, we believe that the circumstances here constitute good cause for waiver of our rules.[14] We further believe that no general preference for public safety entities is created by waiving the requirement in this specific instance.[15]

10. We agree with the Bureau's decision that waiver of the database deletion requirement was warranted under the facts presented. In this instance, the coordinator erred by failing to account for an unconstructed station. This error resulted in Flowermound not filing a renewal of license application for the frequency it was using. This error was

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[13] KCI Application for Review at 20.

[14] *See* 47 C.F.R. § 1.3.

[15] *See* Requests for Waivers of Part 90 of the Commission's Rules by the County of San Bernadino [sic] to Operate a Countywide Public Safety Communications System in the 800 MHz Band, 2 FCC Rcd 6721 (1987) (waiver of Part 90 rules granted to particular public safety entity without creating a general preference). *See generally*, Florida Cellular Mobile Communications Corp., 28 F.3d 191, 199 (1994) (FCC may grant waivers where impact of the rule is contrary to the public interest).

compounded by the Commission's grant of the Lewisville application in reliance on the coordinator's certification. As a result, thousands of dollars of public funds were expended to modify Lewisville's emergency communications services. KCI does not dispute the fact that Flowermound and Lewisville agreed, on October 2, 1992, to utilize Flowermound's channel in conjunction with Lewisville's public safety system. Flowermound was the only entity using the channel prior to the events at issue, and absent the waiver, would possibly lose its right to operate on the channel due to the coordinator's error. If the Bureau had not waived the database deletion requirement, Lewisville's public safety services would have been compromised, as would Flowermound's police, fire, and emergency medical communications services. Consequently, there was good cause shown for waiver of the database deletion requirement.

11. KCI also argues that a prohibited *ex parte* contact occurred when Lewisville sent a copy of a letter, dated June 23, 1993, and addressed to Senator Phil Gramm, to the Commission asking that its modification application be granted and KCI's finder's preference request be denied. KCI asserts that this letter should have been served on counsel for KCI. We disagree with KCI's claim of an alleged *ex parte* violation. Neither the Lewisville application nor the finder's preference action was a formally opposed adjudicatory proceeding.[16] Thus, we find, and KCI does not demonstrate otherwise, that this proceeding was not restricted. In addition, KCI has not demonstrated any injury as a result of the correspondence.[17] As noted above, KCI's finders preference was dismissed as untimely. Accordingly, we find that the correspondence did not prejudice KCI.[18]

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[16] 47 C.F.R. § § 1.1204(b) and 1.1208. *See, e.g.*, Nextel Communications, Inc. 10 FCC Rcd 10450, 10455 (1995) (para. 35).

[17] *C.F.*, One Media Corp, 8 FCC Rcd 4070, 4072 (1993)(para.11) (isolated *ex parte* violation that did not cause prejudice did not warrant imposition of any sanction).

[18] KCI argues that when its finder's preference request was denied, the City of Lewisville knew the results first because its communication (continued...)

CONCLUSION

12. We find that good cause was present for the Bureau's waiver of the database deletion requirement and subsequent grant of Lewisville's application. We agree that the waiver was necessary to protect the public safety and security of two populous communities in the Dallas/Ft. Worth area.

13. For the reasons discussed above, it is hereby ORDERED that the Application for Review filed by Keller Communications, Inc. is DENIED. It is also ORDERED that the Motion to Accept Late-Filed Pleading filed by the City of Lewisville is GRANTED, and the Motion to Strike filed by Keller Communications, Inc. is DENIED.

FEDERAL COMMUNICATIONS
COMMISSION

William F. Caton
Acting Secretary

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[18] (...continued)
coordinator made a status inquiry on the day a letter was sent to KCI. When decisions are made in the finder's preference program, the letters are generally available in the public reference room on the day they are sent, and the decisions are made available to anyone calling and requesting [sic] status of a particular case. The disposition of finder's preference requests is also now published on the Wireless Bureau's Internet Home Page on approximately a weekly basis. KCI makes an erroneous assertion that it was prejudiced by not receiving notice until its mail arrived. KCI in response to the letter filed an application for Flowermound's expired license. Because Flowermound's license expired in February, this application could have been filed in [sic] sometime in March, or any time thereafter.